Want a law? Draft one

Maximilian Steinbeis 2020-06-12T19:36:29

Last year, deep in the era of pre-COVID-19 serenity, there was a popular legislative initiative (*Volksbegehren*) in the German Capital City of Berlin which caused a considerable sensation. Its aim was to bring the state legislation to enact a law in order to communise the property of the huge private housing corporations which have gobbled up much of the formerly state-owned real estate in recent years, as a means to curb housing speculation and stop the explosion of residential rents and the tremendous social problems it ensues, and what's particularly interesting from a constitutionalist point of view: It would be the first practical application of Article 15 of the *Grundgesetz* since 1949, a largely forgotten and supposedly dead constitutional norm which actually allows for the communisation of "real estate, natural resources and means of production" (a rare specimen of Marxist language in the German constitution, who would have thought).

The *Volksbegehren* has been handed over to the Berlin state government almost exactly a year ago with the required number of signatures and has been under legal review ever since. That is quite a long time to check the admissibility of such an initiative which is why the initiators recently filed a lawsuit before the Administrative Court to get things moving at the state Home Office which is responsible for this matter. The lawsuit touches upon a number of interesting legal questions, and the issue of how the communisation of private companies fits into the liberal German legal and constitutional order is extremely fascinating, too, of course. A lot has already been written about this in a dozen expert opinions and also on Verfassungsblog. Here, I am interested in another question, though.

In many German Länder, popular legislative initiatives are a tried and tested procedure and a constitutional way to initiate legislation directly from the middle of society even and especially against the resistance of politics. If the political system, caught in its own dependencies, is unwilling or unable to address a matter that needs to be addressed, then citizens can use this instrument to set a legislative process in motion and, if they mobilize sufficient popular support, bring it to a collectively binding end by means of a referendum.

The Berlin state constitution provides for those popular legislative initiatives to enact, amend or repeal laws (Art. 62 para. 1 p. 1). But it doesn't necessarily end with this. They can also be aimed at "other decisions" which the Chamber of Deputies could take within the scope of its competences "on matters of political decision-making which affect Berlin" (p. 2). In parliamentary business, those motions for resolutions are a familiar thing, asking the House to disapprove of this and support that, all of it legally non-binding but nevertheless useful to nail down political positions between opposition and government.

The real-estate communisation initiative ultimately does aim at legislation: At the end of the process it envisions a law to communize some 250,000 apartments in Berlin.

Actually, however, it is not a draft bill the initiative has been gathering signatures for, but a draft resolution. In it, the Berlin state government is called upon to present a draft bill itself, along with a number of guidelines to follow. It is not actually the initiation of a legislative procedure this is about, but the initiation of the initiation of a legislative procedure.

That may sound somewhat petty and technical, but it makes a big difference.

The right to initiate legislation is a powerful thing. Whoever formulates the question already determines the answer to a large extent, because he can reduce the wide range of options to a limited number of either-or alternatives. Above all, however, it determines the agenda: the question must be answered one way or another. Politically, it is therefore no wonder that the gravitational centre of power is usually located where laws are drafted and not where they are passed. But as dear old Spiderman knew: with great power comes great responsibility, at least in a well-ordered constitutional state, which is why those who draft a law and put them to the

vote must be prepared to accept responsibility for its success and defeat, and for its strengths and weaknesses.

What happens when both, power and responsibility, diverge could be seen in the Brexit referendum: The Leave camp had won and with it the power to insist on the UK leaving the EU. While the responsibility for putting this withdrawal into effect was blissfully placed on the shoulders of the unfortunate PM Theresa May, bless her soul, the Brexiteers were free to enter into an unfettered competition to outbid themselves with ever more most radical interpretations of the referendum result. This fateful power has not stopped its disastrous work to this day. In a few months' time it will tilt the country (and the EU with it) over the edge of the no-deal cliff, unless a miracle occurs. And no one is there to take responsibility for it.

Back to the Berlin popular initiative: If this is admitted, a complex process will be set in motion. Four months after, the initiators can start collecting more signatures. If within another four months at least 7% of the voters have signed, there will be, after another four months, a referendum. This process can be stopped by the center-left state government only if it accepts the desired resolution "unchanged in its essential content" (Art. 62 para. 3, 4 Berlin Constitution). However, since the petition only defines the key points, the initiators remain in a position to claim the role of the authentic interpreter of their petition all the way. Every law that the government drafts and parliament passes will contain some compromise that can then be scandalized as a betrayal of direct democracy and the will of the people.

Things would be different if the initiators had drafted a bill. That would be a clear thing: You could look at it, form an opinion and either approve or reject it or pass another bill in its place. The initiators didn't feel capable to do that. Understandable. It's tricky stuff, for sure. But then perhaps their *Volksbegehren* is simply inadmissible?

The week on Verfassungsblog

… summarized by LENNART KOKOTT:

To stick with Berlin: with some background noise, the Berlin **Anti-Discrimination Act** was passed this week. In Corona Constitutional #33, CHARLOTTE HEPPNER talked at length with DORIS LIEBSCHER, who has been involved in the drafting of the Act for several years, about the law, why it is valuable for people affected by discrimination and where the criticism on the last meters came from. ALEXANDER TISCHBIREK and TIM WIHL deconstruct one of the main points of criticism: police officers need not fear that they will be held personally liable to a greater extent than before. The redistribution of the burden of proof included in the Act, they say, is actually quite common in anti-discrimination law and seems necessary due to ECtHR case law.

In a separate contribution, DORIS LIEBSCHER deals with the debate whether the concept of *Rasse* (translatable as race with stark connotations of colonial and Nazi

thought) as a category of discrimination in Article 3 (3) of the *Grundgesetz* should be replaced and argues for a post-categorial approach which would make it clear that **racial discrimination** is an asymmetrical phenomenon. AMADOU KORBINIAN SOW argues that in light of the current debate on structural and everyday racism, the opportunity should not be missed to bring people of color's knowledge about that matter to the public. He also shows how "white" jurisprudence in Germany could tackle an overdue project of self-enlightenment and broadening perspectives.

The case VERA MAGALI KELLER, NASSIM MADJIDIAN and FLORIAN SCHÖLER present may show that in the debate on combating racism and discrimination, governments must not only be measured by words but also by deeds. They draw attention to recent amendments to regulations from the Federal Ministry of Transport which are aimed at permanently obstructing private sea rescue operations, and warn of a renewed humanitarian disaster in the Mediterranean.

DANIEL ERASMUS-KHAN also diagnoses a certain Janus-facedness for the authorizations of arms exports from the Federal Republic. These exports are questionable anyway in view of the pacifist tone of the *Grundgesetz*, he says, but in any case the authorization process in its present form is blatantly unconstitutional because it is conducted by the wrong federal office.

ANDREAS FISCHER-LESCANO and ANDREAS GUTMANN deal with the criminal prosecution in cases of **adbusting**, i.e. the replacement of advertising posters with satirical-political messages. The persecution in Germany is comparatively intense and, against the background of freedom of opinion, all the more problematic because it amounts to legal action against specific opinion content, they say.

JOHANNES KEMPER deals with the **publicity of the parliamentary process** in the pandemic, taking the disputes about live streams of committee meetings in the North Rhine-Westphalian parliament as an opportunity to ask whether such a transmission is constitutionally required at present, but also in post-pandemic times, and what opportunities it could offer to parliaments.

CHARLOTTE HEPPNER talks about the recent decision of the Federal Constitutional Court on derogatory statements about the far-right AfD party on the website of the Federal Home Office in Corona Constitutional #34 with SOPHIE SCHÖNBERGER UND MEHRDAD PAYANDEH. The context of the decision, namely the FCC's judication of government officials' right of expression is examined as well as the concept of the political of the FCC and the tactics of the AfD which has made a habit of suing the government in Karlsruhe.

In view of the continuing frictions as a result of **the Karlsruhe *PSPP* ruling**, DANIEL REICHERT-FACILIDES suggests taming the *ultra vires* dragon through procedural measures, and in doing so he has, among other things, a referendum on the Gerxit under Article 50 TEU in mind, which the Joint Senate of the FCC would have to initiate if the court was to proclaim an act *ultra vires*. OLAF KOWALSKI deals with the dialogue between legal scholars and economists and, not least from the perspective of systems theory, explores under which circumstances it may lead to productive irritations, or, alternatively, to a Luhmannian white noise between the disciplines. FRANCISCO DE ABREU DUARTE and MIGUEL MOTA DELGADO reconstruct the dispute between the European Court of Justice and national constitutional courts as one that centers around methodology, which must therefore also be brought to an innovative institutional and procedural solution, since the methodological conflict cannot be resolved by recourse to one of the two conflicting legal systems alone.

From European judicial federalism to **administrative federalism**: PETER VAN ELSUWEGE deals with the abolition of travel restrictions in the European Union, shows the disparities in the implementation practice of the member states and argues for a new version of the European distribution of competences in order to be able to provide a real European answer in future crises.

Finally, MARTIN HÖPNER deals with a question of **legislative federalism in the Union**. Against the background of current proceedings before the European Court of Justice, he examines whether and to what extent the Union legislator is bound by the fundamental freedoms and points out the practical-political implications of the expected result.

EWA SIEDLECKA presents the case of the Polish judge Waldemar #urek as an instructive play, albeit more of the tragic kind, that shows how the undermining of **the**

rule of law also works: through permanent harassment and official prosecution of inconvenient judges. URSUS EIJKELENBERG uses the Trump vs. Twitter debate to raise the question of whether liberal democracies need to become more aware of the practices of powerful corporations in the communications sector, traces the development of the concept of censorship in this context and pleads for a morally unbiased view of the problem. BHARATT GOEL presents the jurisprudence of various countries on sexual and gender identity, which, under the paradigm of freedom of expression, leads to liberalization and decriminalization. KARTIKEYA JAISWAL and PRANAY MODI deal with the question of how courts can enforce constitutionally guaranteed human dignity when the executive and legislative branches fail, based on the degrading situation of sewer workers in India.

DIMITRY KOCHENOV presents his own case in which the drafting of legal expertise caused political controversy about the integrity and scientific character of the expert, who, as a result of publications on European citizenship law, has been unflatteringly labelled in public as “the passport professor” and has been subjected to a commission of inquiry at his university.

In our **current debate** *Lieferkettengesetz Made in Germany*, MARKUS KRAJEWSKI examines whether the Federal Republic of Germany is obliged under international law to enact a supply chain law, focusing in particular on the extraterritorial dimension of fundamental rights protection obligations. ALEXANDER SCHALL examines the question of whether human rights violations by companies trigger a civil liability for damages and states that it is the responsibility of the legislator to establish clear regulations in this regard. MATTHIEU BINDER argues that a supply chain law would also have to take a closer look at certification companies. ANTON ZIMMERMANN deals with potential tort claims against companies and looks at the hurdles posed by international tort law and the distribution of the burden of proof for such claims. MARKUS KALTENBORN shows what the human rights due diligence obligations of companies under a supply chain law might look like. NICOLAS BUENO presents the long road to a legally secure regulation of corporate liability in Switzerland. PIERRE THIELBÖRGER and TIMEELA MANANDHAR show which steps would be necessary to clearly legally emphasize the special due diligence duties of companies in conflict and high risk regions. ISABELL HENSEL and JUDITH HOELLMANN discuss how a supply chain law can take precautions to address and combat gender inequality along the supply chain.

So much for this week. You know what’s great? That we are about to cross the 400 supporters threshold on Steady. That is what’s great. Only six more to go. Do you think we can reach that this week?

Otherwise, there is always, with pleasure and to our greatest gratitude, the possibility to just send some money (paypal@verfassungsblog.de, IBAN DE41 1001 0010 0923 7441 03, BIC PBNKDEFF).

All the best,

Max Steinbeis